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Estoppel by Deed--Conveyance of Interest Subsequently Acquired as Heir--Warranty in Quitclaim Deed as Basis for Estoppel

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element would be particularly important in view of the well established rule that rents belong to the owner of property on rent day.[13]

Therefore it is submitted that our court reached a result not only in accord with the weight of authority, but, what is more important, also in accord with the policy of maintaining practical and well settled rules concerning wills and their construction.

J. G. McC.

ESTOPPEL BY DEED — CONVEYANCE OF INTEREST SUBSEQUENTLY ACQUIRED AS HEIR — WARRANTY IN QUITCLAIM DEED AS BASIS FOR ESTOPPEL. — *T* devised to *W*, his wife, a life estate in his property, with power of consumption of the corpus for her support, remainder to his children in fee, share and share alike. In 1929 *A*, one of the children, gave a deed of trust for his share, with covenants of general warranty, and in the same year two judgments were obtained against him. *W* died intestate in 1932. A lien creditors' suit was thereafter brought to subject *A*'s interest in the property to sale in satisfaction of the judgments. *Held*, that since *W* had absolute power of disposition over the property, and therefore took the fee, the children took no interest under the will; that *A* had nothing to convey and conveyed nothing by his deed of trust; that the deed could not operate as an assignment of an expectancy in the property; that therefore, since the property descended to *A* by intestacy in 1932 and not before, it then became subject to the judgment liens, and the grantee and cestui under the trust deed took no interest. *Swan v. Pople.*[1]

Under a theory of estoppel by deed this property, an undivided one-seventh interest in the testator's estate, would have passed under the trust deed, as soon as the son became entitled to it. The applicable rule is that if a grantor having no title or defective title, or an estate less than that which he assumes to grant, conveys with warranty or covenants of like import and subsequently acquires the title or estate which he purports to convey, or perfects his title, such after-acquired or after-perfected title will enure to the grantee or to his benefit by way of estoppel.[2] It is

[13] Rockingham v. Penrice. 1 P. Wms. 177 (1711).

[1] 190 S. E. 902 (W. Va. 1937).

[2] Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119 (1910); Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410 (1908); Yock v. Mann, 57 W. Va. 187, 49 S. E. 1019 (1905); Clark v. Sayers & Lambert, 55 W. Va. 512, 47 S. E. 312 (1904); Summerfield v. White, 54 W. Va. 311, 46 S. E. 154 (1903); Mitchell v. Petty, 2 W. Va. 470, 98 Am. Dec. 777 (1868).

also settled that as between mortgagor and mortgagee, a mortgage with covenants of warranty will pass an after-acquired title.[3] These principles are fairly well established, so the real problems involved are: (1) the conveyance of an interest which the grantor subsequently takes as an heir, and (2) whether the description of the property in the trust deed is sufficient to create an estoppel.

Many jurisdictions hold that an attempt by an heir to convey an expectancy is absolutely void and connot serve as the basis of an estoppel.[4] The present deed, however is not an attempt to convey an expectancy; the court in its opinion specifically negatives this proposition. *The deed purports to convey a present interest;* and the rule in West Virginia seems to be that in such case, even though the land does eventually come to the grantor through inheritance, it will enure to the benefit of the grantee.[5] An excellent illustration of the present issue occurs in a Texas case,[6] where the father and mother of seven children owned an estate in common. The former died in 1883, his wife surviving until 1911. In 1888 one child made a present conveyance of an undivided one-seventh interest in the land by warranty deed, "the interest in and to the same hereby conveyed being the interest which descended to me as son and heir" of these parents. The grantor had inherited nothing from the mother because she was still living. The court observed, "we think that on its face, it [the deed] is unambiguous and clearly purports to convey an entire one-seventh interest in the land described in the deed. Such being the terms of the deed, we think, in accordance with familiar authorities, that the general warranty quoted was sufficient to convey the after-acquired title which descended to [the grantor] upon the death of his mother." Similar-

[3] Edwards v. Davenport, 20 Fed. 756, 4 McCrary 34 (C. C. S. D. Iowa 1883); Ross v. Harney, 139 Ill. App. 513 (1908); Ayer v. Philadelphia & B. Brick Co., 157 Mass. 57, 31 N. E. 717 (1892); Northrup v. Ackerman, 84 N. J. Eq. 117, 92 Atl. 909 (1915).

[4] It must not appear on the face of the deed that at the time of the execution the subsequently acquired title was outstanding in third parties, and not in the grantor or mortgagor. Flatt v. Flatt, 189 Ky. 801, 225 S. W. 1067 (1920); Dailey v. Springfield, 144 Ga. 395, 87 S. E. 479 (1915); Spacey v. Close, 184 Ky. 523, 212 S. W. 127 (1919).

[5] Buford v. Adair, 43 W. Va. 211, 27 S. E. 260 (1897), grantor deeded property in which she had remote contingent right. Held, that whether sufficient or not as a conveyance, it operated as an estoppel in favor of a purchaser in good faith. Custer v. Hall, 71 W. Va. 119, 76 S. E. 183 (1912), where husband and wife had deeded land with warranties, and the deed was bad as to the wife, when the husband inherited her interest as her heir, he was estopped to claim title to this interest.

[6] Pritchard v. Fox, 154 S. W. 1058 (Tex. Civ. App. 1913).

ly, in a recent West Virginia opinion[7] by the judge who wrote the opinion in *Swan v. Pople*, there was a present conveyance of land subsequently inherited. Although this conveyance was held not to give rise to an estoppel by deed, because of lack of a warranty, the court indicated by dicta that had there been a warranty, estoppel would have applied.

A difficult issue arises in the present case as to whether the terms of the deed were such as to support an estoppel.[8] The instrument purported to convey by warranty all of the "right, title and interest" devised to the son by the provisions of the testator's will. "Deeds and mortgages, in this respect [as to estoppel by deed] seem to stand on the same footing, although in case of mortgages there may be stronger reasons for sustaining the rule, because of the continuing relations arising from the very nature of the transaction."[9] Obviously, the question of estoppel depends on the intent of the parties as gathered from the deed or mortgage as a whole.[10] The court in the instant case said, "It would seem that the grantor attempted to convey and warranted that which he *thought* he took under the will." At least one leading jurisdiction holds a warranty, following the conveyance of merely the grantor's right, title and interest, if made in such form as to be construed as being more extensive than the conveyance, creates an estoppel co-extensive with the covenant.[11] It would thus seem that the trust deed relied on might have been sufficient to convey by estoppel the after-acquired title. Moreover, as furthering this contention, there is some authority to the effect that estoppel based on mortgages is subject to very little limitation..[12]

The West Virginia rule is that a covenant of general warranty

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[7] Egnor v. Roberts, 191 S. E. 532 (W. Va. 1937).

[8] The trust deed, after stating that it conveyed with general warranties "all of the following described property and property rights . . . owned and possessed, or to which they or either of them, is entitled to own and possess in and to all of the real and personal estate of every kind and description owned and possessed by [testator] . . . the same being more particularly described as follows . . . ." then specified:

"1. All of the right, title and interest of every kind and description in and to all of the real estate that was, and is, devised unto the said [devisee] . . . . one of the parties of the first part, in and by the terms and provisions of the last will and testament of [testator] . . . . "

[9] Note (1929) 58 A. L. R. 350, 356.

[10] *Id.* at 358.

[11] Ayer v. Philadelphia & B. Brick Co., 159 Mass. 84, 34 N. E. 177 (1893).

[12] "The rule of estoppel to assert an after-acquired title or interest has been stated in general terms, in cases of mortgages, from which the inference might be drawn that the court regarded the rule to be that a mortgagor, regardless

in a deed does not enlarge the estate thereby granted.[13] In other words it would seem that a quitclaim deed, even though it contain a covenant of general warranty, will not operate as the basis of an estoppel. However, this rule should be subject to certain qualifications. The effect of language in a deed is to be gathered from the whole of it, not disjointed parts, so as to give effect to the whole instrument. The intention of the grantor as derived from the deed itself should be sought after, and if discovered, should be carried into effect, if it can be done consistently with rules of law.[14] Modern construction has leaned towards the intention overriding mere form and technical words, and the intention must rule the construction in deeds as well as in wills.[15] One jurisdiction, in a case very similar to this, held that a grant of "all the grantor's estate, right, title and interest whatsoever under the will of [the testator] or otherwise," operated as the basis of an estoppel even in the absence of covenants.[16] The present deed,[17] although the describing clause is technically in the form of a quitclaim deed, indicates an attempt not to pass the right, title and interest actually conveyed by the will, but the interest evidenced by the terms of the will.[18] If it is determined that this is the evident intent of the deed, the grantor and his privies should be estopped from asserting the after-acquired title.[19]

No question can be raised as to the operation of an estoppel as against judgment creditors. It is clear that estoppel of the grantor is binding on those in privity with him, and a judgment

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of the terms, recitals, or covenants of the mortgage, is estopped to assert an after-acquired title or interest." Note (1929) 58 A. L. R. 391 (numerous additional citations under this note).

13 King v. Smith, 88 W. Va. 312, 106 S. E. 704 (1921); Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 13 S. E. 49 (1891).

14 Uhl v. Ohio River R. R. Co., 51 W. Va. 106, 41 S. E. 340 (1902).

15 *Ibid.* W. Va. Rev. Code (1931) c. 36, art. 4, § 17.

16 Hannon v. Christopher, 34 N. J. Eq. 459 (1881).

17 *Supra* n. 8.

18 "It would seem that the grantor attempted to convey and warranted that which he thought he took under the will." Swan v. Pople, 190 S. E. 902 (W. Va. 1937).

19 The general rule is that a quitclaim deed conveys only the existing interest, but this principle is applicable to a deed by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded on that footing between the parties, then estoppel by deed will apply. Van Rensselaer v. Kearney, 52 U. S. 297, 301, 13 L. Ed. 703 (1850).

creditor is privy to the judgment debtor.[20] Whether or not the trust deed preceded the lien in point of time is immaterial; even though the judgment lien had priority, this would not prevent the land from passing to the grantee by estoppel subject to the judgment lien.[21]

The general rule is that estoppel by deed must be specially pleaded in order to be availed of.[22] From the opinion it does not appear that there was such a plea; therefore the court could not have considered it.

J. H. H.

MASTER AND SERVANT — LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE IN DRIVING MASTER'S CAR TO SERVANT'S HOME. — The sales-manager of the used car department of the defendant company had the right to use the cars of the company for his own personal purposes as well as for business uses. After a "frolic of his own," which terminated after working hours, he drove past the used car department to see if all the cars were in for the night. On the way home from there (a number of blocks from the place of business) he negligently ran over the plaintiff, who recovered judgment against the driver and the defendant company, owner of the car. The owner appealed contending that the court should have directed a verdict for the defendant on the ground that the salesman was not at the time acting within the scope of his employment. *Held*, that the question whether or not the driver was acting within the scope of his employment was properly submitted to the jury. Judgment was reversed on other grounds. *Meyn v. Dulaney-Miller Auto Co.*[1]

In its opinion the court states that generally where a servant has permission to use a car in order better to execute his business

[20] Egnor v. Roberts, 191 S. E. 532 (W. Va. 1937), at a judicial sale, a purchaser obtains the whole title and interest in the property sold, which was vested in the owner at the time of the sale and no more. Freudenberger Oil Co. v. Gardner, 79 W. Va. 46, 90 S. E. 815 (1916); Bennett v. Booth, 70 W. Va. 264, 73 S. E. 909 (1912); Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591 (1892).

[21] A debtor against whom there existed a judgment lien gave warranty deed of land which he expected to inherit. The land subsequently descended and the court held that the grantee took the land subject to the judgment lien. Bliss v. Brown, 78 Kan. 467, 96 Pac. 945 (1908).

[22] Estoppel by deed must be specially pleaded or considered as waived, McCorkell v. Herron, 128 Iowa 324, 103 N. W. 988 (1905); Hanson v. Buckner, 4 Dana 251, 29 Am. Dec. 401 (Ky. 1836).

[1] 191 S. E. 558 (W. Va. 1937).